

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MICHAEL EDWARD CLARK,

Petitioner,

vs.

DIRECTOR OF NEVADA

DEPARTMENT OF CORRECTIONS,

et al.,

Respondents.

) 2:09-cv-1428-RLH-GWF

ORDER

This is a petition for writ of habeas corpus in which petitioner, a state prisoner, is proceeding *pro se*. Pending before the court is respondents' motion to dismiss.

PROCEDURAL HISTORY

On December 24, 2007, the Eighth Judicial District Court of the State of Nevada entered a judgment of conviction against petitioner. Exhibit 50. A jury found petitioner guilty of the crimes of conspiracy to violate the controlled substance act, sale of a controlled substance (cocaine), and possession of a controlled substance with intent to sell (cocaine). *Id.* The trial court sentenced

1 petitioner to a minimum term of twenty-four months and a maximum of sixty months on the
 2 conspiracy count, thirty-two months to seventy-two months on the sale count, and nineteen months
 3 to forty-eight months on the possession with intent to sell count. *Id.* All terms were imposed to run
 4 concurrently. *Id.*

5 On January 9, 2008, petitioner filed his notice of direct appeal. Exhibit 51. The
 6 Nevada Supreme Court affirmed petitioner's conviction on April 8, 2009. Exhibit 72. Remittitur
 7 issued on May 5, 2009. Exhibit 75.

8 Petitioner did not file a petition for writ of habeas corpus in any Nevada court. The
 9 present petition for writ of habeas corpus was received by this court on August 3, 2010. (Docket #1.)
 10 The petition contains four grounds for relief. (*Id.*) Respondents filed the motion to dismiss now
 11 pending before the court on February 8, 2010. (Docket #14.) On February 26, 2010, petitioner filed a
 12 motion to strike respondents' motion to dismiss. (Docket #19.) Respondents filed a reply on March
 13 8, 2010, (Docket #20) and petitioner filed a motion for sanctions and copies on May 6, 2010. (Docket
 14 #21.)

15 **LEGAL STANDARDS**

16 The Antiterrorism and Effective Death Penalty Act ("AEDPA"), at 28 U.S.C. §
 17 2254(d), provides the legal standard for the Court's consideration of this habeas petition:

18 An application for a writ of habeas corpus on behalf of a person
 19 in custody pursuant to the judgment of a State court shall not be granted
 20 with respect to any claim that was adjudicated on the merits in State
 21 court proceedings unless the adjudication of the claim –

22 (1) resulted in a decision that was contrary to, or involved an
 23 unreasonable application of, clearly established Federal law, as
 24 determined by the Supreme Court of the United States; or

25 (2) resulted in a decision that was based on an unreasonable
 26 determination of the facts in light of the evidence presented in the State
 27 court proceeding.

The AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000) and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

10 Federal habeas corpus rules require that a petition shall “specify all the grounds for
11 relief available to the petitioner” and “state the facts supporting each ground.” Rule 2(c), Rules
12 Governing Section 2254 Cases in the United States District Courts. Notice pleading is insufficient for
13 a habeas corpus petition, as it must point to a real possibility of constitutional error. Rule 4, Rules
14 Governing Section 2254 (Advisory Notes, adopted 1976.)

DISCUSSION

In his first ground for relief, petitioner alleges that the trial court's failure to appoint stand-by counsel violated his sixth amendment right to counsel and fifth and fourteenth amendment right to due process. He also alleges that the court's refusal to appoint an investigator and setting of bail at \$50,000 violated his fourteenth amendment right to due process and fifth amendment right to reasonable bail. Respondent moves to dismiss ground one of the petition on the ground that it fails to state a federal question and is conclusory, and also on the ground that it is unexhausted.¹

²⁴ ¹Because of the court's findings regarding the failure of ground one to state a claim for relief,
²⁵ the court finds it unnecessary to address the issue of exhaustion.

1 A criminal defendant who has chosen to represent himself has no constitutional right
 2 to “hybrid” representation. *United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994). The
 3 Ninth Circuit has held that, “[a]dvisory counsel is generally used to describe the situation when a *pro*
 4 *se* defendant is given technical assistance by an attorney in the courtroom, but the attorney does not
 5 participate in the actual conduct of the trial.” *Locks v. Sumner*, 703 F.2d 403, 406 (9th Cir. 1983),
 6 *cert. den.*, 464 U.S. 933, 104 S.Ct. 338, 78 L.Ed.2d 307 (1983). It further explained that when “co-
 7 counsel” is appointed, “the attorney may participate directly in the trial proceedings with the
 8 defendant (examining witnesses, objecting to evidence, etc.).” *Id.* Finally, “[s]tandby” counsel
 9 refers to the situation where a *pro se* defendant is given the assistance of advisory counsel who may
 10 take over the defense if for some reason the defendant becomes unable to continue.” *Id.* at n. 3.

11 In the present case, petitioner contends that he because he was denied “standby
 12 counsel” he was unable to: 1) obtain exculpatory videotape and witness evidence; 2) present an
 13 entrapment defense; and 3) present evidence that an officer planted cocaine. As respondents argue,
 14 although petitioner has described his request as one for “standby counsel,” his allegations show that
 15 he wished to have counsel appointed in order to assist him with both trial preparation and trial
 16 presentation. Thus, the court must agree with respondents that petitioner’s request is better described
 17 as one for advisory counsel. The Ninth Circuit has expressly held that no constitutional right to
 18 advisory counsel exists, and that the appointment of such counsel rests with the sound discretion of
 19 the court. *Locks v. Sumner*, 703 F.2d at 408. Accordingly, the court finds that petitioner’s claims
 20 based on the court’s failure to appoint advisory counsel fail to state a federal claim cognizable in this
 21 petition for writ of habeas corpus.

22 Petitioner also alleges that the denial of the appointment of an investigator violated his
 23 constitutional rights. An indigent defendant does not have a constitutional right to state-funded
 24 investigative services absent a showing of need. *Smith v. Enomoto*, 615 F.2d 1251, 1252 (9th Cir.
 25 1980), *cert. den.*, *Smith v. Director*, 449 U.S. 866, 101 S.Ct. 199, 66 L.Ed.2d 84 (1980). In the
 26

1 present case, petitioner alleges nothing beyond that he was held in jail during trial preparation to
 2 demonstrate need for an investigator. The Ninth Circuit has held such an allegation insufficient to
 3 establish need. *Smith v. Enomoto*, 615 F.2d at 1252. Thus, the court again finds that petitioner's
 4 allegation does not state a federal claim cognizable in the present action.

5 Finally, petitioner contends that his fifth amendment right to reasonable bail was
 6 violated. The Ninth Circuit has held that a criminal defendant has no absolute right to bail. *Kelly v.*
 7 *Springett*, 527 F.2d 1090 (9th Cir. 1975). Petitioner argues that the bail was set at an amount outside
 8 his reach, and argues that the bail was set without taking into account the factors set forth in NRS
 9 178.498. However, this state law argument cannot support a claim for relief in this federal habeas
 10 corpus action, and bail is not excessive merely because a defendant cannot pay it. *White v. Wilson*,
 11 399 F.2d 596, 598 (1968). Petitioner's argument regarding the imposition of bail does not state a
 12 federal claim.

13 In response to respondents' motion to dismiss, petitioner filed a document entitled,
 14 "Motion to Strike DKT 14, Motion for Default or Case-dispositive Sanctions be imposed, Petitioner's
 15 Opposition to Motion to Dismiss and A Request for Discovery." (Docket #19.) Respondents filed a
 16 reply on March 8, 2010. (Docket #20.)

17 In his response to respondents' motion to dismiss, petitioner first argues that
 18 respondents' motion to dismiss violates the court's order of October 14, 2009. (Docket #4.) In that
 19 order, the court stated that, "[s]uccessive motions to dismiss will not be entertained." (*Id.*) The
 20 motion to dismiss currently before the court is the first motion to dismiss which respondents have
 21 filed. Thus, it is not a successive motion to dismiss. The court therefore finds that petitioner's
 22 argument is meritless. Further, although petitioner claims that respondents were required to file an
 23 answer, this is incorrect. The court's order expressly directed respondents "to answer, or otherwise
 24 respond, to the petition." Thus, respondents were not required to file an answer.

25
 26

1 The court finds petitioner's claim that respondents have defaulted similarly meritless.
2 Respondents have appeared in this action and timely responded to the petition. There is no basis for
3 finding a default by respondents. Thus, sanctions are entirely unwarranted.

4 Petitioner has not responded to the merits of respondents' motion. Although he
5 discusses the standard for a motion for summary judgment, this discussion is irrelevant to the present
6 motion to dismiss.

7 Finally, petitioner requests discovery, speculating first that this will automatically
8 result in the appointment of counsel. This is incorrect. The granting of discovery does not
9 necessarily result in the appointment of counsel. Further, unlike other civil litigation, a habeas corpus
10 petitioner is not entitled to broad discovery. *Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793, 1796-
11 97 (1997); *Harris v. Nelson*, 394 U.S. 286, 295, 89 S.Ct. 1082, 1088-89 (1969). Although discovery
12 is available pursuant to Rule 6, it is only granted at the court's discretion, and upon a showing of good
13 cause. *Bracy*, 117 S.Ct. 1793, 1797; *McDaniel v. United States Dist. Court (Jones)*, 127 F.3d 886,
14 888 (9th Cir. 1997); *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997); Rule 6(a) of the Rules
15 Governing Section 2254. The Advisory Committee Notes to Rule 6 of the Rules Governing Section
16 2254 Cases emphasize that Rule 6 was not intended to extend to habeas corpus petitioners, as a matter
17 of right, the Federal Rules of Civil Procedure's broad discovery provisions. Rule 6, Advisory
18 Committee Notes (quoting *Harris*, 394 U.S. at 295, 89 S.Ct. at 1089). In this case, petitioner has
19 simply listed a number of documents, claiming that he needs to have them to show illegal
20 confinement. Petitioner does not connect any particular document with any claim, does not explain
21 why they are necessary, and does not explain why these documents were not obtained in connection
22 with earlier proceedings. The court therefore finds that petitioner has not shown the good cause
23 necessary to support his request for discovery.

24 On May 6, 2010, petitioner filed a motion for sanctions, claiming that he was not
25 served with a copy of respondents' reply to his response to the motion to dismiss. (Docket #21.) He
26

1 claims he was prejudiced thereby, because he did not have a chance to respond. Respondents' reply is
2 accompanied by a certificate of service on petitioner, but the address is incorrect. However, no
3 prejudice has been suffered to petitioner, because under the Federal Rules of Civil Procedure, he had
4 no right to respond to the reply. Respondents will be directed to correct their records to reflect the
5 correct mailing address for petitioner.

6

7 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss is GRANTED.
8 (Docket #14.) Ground one is dismissed from this action with prejudice.

9 **IT IS FURTHER ORDERED** that petitioner's motion to strike is DENIED. (Docket
10 #19.)

11 **IT IS FURTHER ORDERED** that petitioner's motion for sanctions and copies is
12 DENIED. (Docket #21.) Respondents are directed to correct their records so as to reflect
13 petitioner's address shown the this court's docket sheet.

14 **IT IS FURTHER ORDERED** that respondents shall have **forty-five (45)** days from
15 entry of this order within which to answer the remaining grounds for relief in the petition. In their
16 answer respondents shall address any claims presented by petitioner in his petition as well as any
17 claims presented by petitioner in any Statement of Additional Claims. Respondents shall comply with
18 the requirements of Rule 5 of the Rules Governing Proceedings in the United States District Courts
19 under 28 U.S.C. §2254. Petitioner shall have **forty-five (45) days** from the date of service of the
20 answer to file a reply.

21

22

23 DATED this 13th day of May, 2010.

24

25

26


UNITED STATES DISTRICT JUDGE